

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Angela Nails,

10 Plaintiff,

11 v.

12 Melodi Guilbault,

13 Defendant.
14
15

No. CV-22-00489-PHX-DGC

ORDER

16
17 Plaintiff Angela Nails has appealed the Court’s dismissal of her complaint without
18 prejudice (Doc. 7) and the Clerk’s judgment dismissing her action with prejudice (Doc. 8).
19 Doc. 9. The Ninth Circuit referred the matter to the Court “for the limited purpose of
20 determining whether in forma pauperis [(“IFP”)] status should continue for this appeal or
21 whether the appeal is frivolous or taken in bad faith.” Doc. 11.

22 **I. Background.**

23 Plaintiff filed suit against the instructor of a doctoral-level dissertation course at
24 Northcentral University. Doc. 7 at 2. The Court granted Plaintiff IFP status, dismissed her
25 original complaint for failure to state a claim for relief and for failing to adequately plead
26 a basis for federal jurisdiction, and granted her leave to file a first amended complaint
27 (“FAC”). *Id.* Plaintiff filed an FAC. In a June 14, 2022 order, the Court screened
28 Plaintiff’s FAC and found that it failed to state a claim for relief. *Id.* at 8.

1 The FAC asserted four claims: a constitutional claim for the deprivation of
2 Plaintiff's right to receive an education, two contract claims, and a negligence claim for
3 Defendant's alleged failure to protect Plaintiff's academic progress. Doc. 6 at 5-6. The
4 Court found that Plaintiff failed to state a constitutional claim for several reasons: (1) there
5 is no federally recognized right to an education and Plaintiff did not cite any legal authority
6 suggesting the state had created an entitlement or other property interest in doctorate-level
7 education to which Fourteenth Amendment procedural due process protections might
8 apply; (2) even if she had established a constitutional right, she had not shown what action
9 Defendant took that allegedly violated that right; and (3) Plaintiff did not allege any action
10 taken under color of state law because Northcentral University and its employees are
11 private parties. Doc. 7 at 3-4. The Court found that Plaintiff's contract claims failed to
12 state a plausible claim for relief because the claims relied on alleged contracts to which she
13 was not a party or a third-party beneficiary. *Id.* at 5. The Court held that Plaintiff did not
14 state a negligence claim because, although she may have plausibly alleged that Defendant
15 owed a duty of ordinary care to her by virtue of their student-teacher relationship, she did
16 not state how Defendant's alleged actions exposed her to a foreseeable and unreasonable
17 risk of harm or caused her any injury. *Id.* at 6.

18 The Court dismissed Plaintiff's FAC without prejudice and granted Plaintiff leave
19 to amend for a second time. *Id.* at 8. The Court ordered Plaintiff to file her second amended
20 complaint by July 13, 2022, and warned her that if she failed to do so, the action would be
21 dismissed with prejudice without any further order of the Court. *Id.* Plaintiff did not file
22 a second amended complaint. A Clerk's judgment was entered dismissing the action with
23 prejudice on July 27. Doc. 8. Plaintiff filed a notice of appeal on August 5. Doc. 9.

24 **II. Discussion.**

25 "An appeal may not be taken [IFP] if the trial court certifies in writing that it is not
26 taken in good faith." 28 U.S.C. § 1915(a)(3). A "good faith" appeal must seek review of
27 at least one "non-frivolous" issue or claim. *Hooker v. Am. Airlines*, 302 F.3d 1091, 1092
28 (9th Cir. 2002). The term "frivolous," as used in § 1915, "embraces not only the inarguable

1 legal conclusion, but also the fanciful factual allegation.” *Neitzke v. Williams*, 490 U.S.
2 319, 325 (1989).

3 Plaintiff’s appeal of the Court’s order dismissing her FAC without prejudice and the
4 Clerk’s judgment dismissing her action with prejudice raises no non-frivolous issue or
5 claim. Plaintiff cannot state a constitutional claim under § 1983 without alleging state
6 action or the violation of a recognized constitutional right. *West v. Atkins*, 487 U.S. 42, 48
7 (1988) (“To state a claim under § 1983, a plaintiff must allege the violation of a right
8 secured by the Constitution and laws of the United States, and must show that the alleged
9 deprivation was committed by a person acting under color of state law.”); *Plyler v. Doe*,
10 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the
11 Constitution.”). Nor can Plaintiff state a breach of contract claim where she does not allege
12 that she is a party or third-party beneficiary to the contract. *Lofts at Fillmore Condo. Ass’n*
13 *v. Reliance Com. Const., Inc.*, 190 P.3d 733, 734 (Ariz. 2008) (“[A]s a general rule only
14 the parties and privies to a contract may enforce it.”) (quoting *Treadway v. W. Cotton Oil*
15 *& Ginning Co.*, 10 P.2d 371, 375 (Ariz. 1932)); *Norton v. First Fed. Sav.*, 624 P.2d 854,
16 856 (Ariz. 1981) (“The Arizona rule is that in order for a person to recover as a third-party
17 beneficiary of a contract, an intention to benefit that person must be indicated in the
18 contract itself, [t]he contemplated benefit must be both intentional and direct, and it
19 must definitely appear that the parties intend to recognize the third party as the primary
20 party in interest.”) (internal quotations and citations omitted). Plaintiff also cannot state a
21 negligence claim without alleging actions constituting a breach of the applicable standard
22 of care, resultant injuries, or damages. *Gipson v. Kasey*, 214 P.3d 228, 230 (Ariz. 2007)
23 (en banc) (“To establish a claim for negligence, a plaintiff must prove four elements: (1) a
24 duty requiring the defendant to conform to a certain standard of care; (2) a breach by the
25 defendant of that standard; (3) a causal connection between the defendant’s conduct and
26 the resulting injury; and (4) actual damages.”).

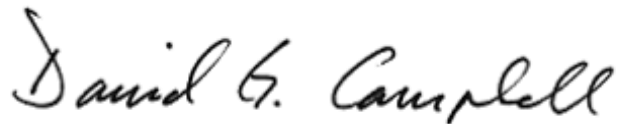
27 Plaintiff’s FAC did not conform to these standards and the Court reached the
28 inarguable legal conclusion that it must be dismissed. The Court gave Plaintiff a reasonable

1 time to amend her complaint for a second time to cure the deficiencies. Doc. 7 at 8. The
2 Court made clear that her case would be dismissed without further order if she failed to
3 amend. *Id.* Plaintiff decided not to amend her complaint, and her case was dismissed with
4 prejudice. Doc. 8.

5 Based on the record before it, the Court finds that any appeal taken from its June 14,
6 2022 order dismissing Plaintiff's action without prejudice, (Doc. 7) and the Clerk's
7 judgment dismissing her action with prejudice (Doc. 8), is frivolous.

8 **IT IS ORDERED** that Plaintiff's IFP status is **revoked**.

9 Dated this 16th day of August, 2022.

10 
11

12 David G. Campbell
13 Senior United States District Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28